No. 03-1667

JUL 14 2004

IN THE

Supreme Court of the United States

BONAVITACOLA ELECTRIC CONTRACTOR, INC., *et al.*,

Petitioners,

v.

BORO DEVELOPERS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals for the Third Circuit err in Affirming the District Court's grant of Respondents' Motion to Dismiss under Fed. R. Civ. P 12(b)(6) where the Amended Complaint failed to sufficiently plead predicate acts of mail and wire fraud with requisite particularity, did not allege the requisite "pattern of racketeering activity" and did not allege direct injury required for standing under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1962(a) and 1962(c)?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Boro Developers, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER STATEMENT OF THE CASE

Procedural History

Bonavitacola Electric Contractor, Inc., Local Union No. 654, International Brotherhood of Electrical Workers, Local Union No. 98, International Brotherhood of Electrical Workers, and Curtis Bell (hereafter "Petitioners") initiated this action in the Eastern District of Pennsylvania on October 31, 2001. Boro Developers, Inc. and its two principal officers, Frederick J. Shapiro and Bruce Shapiro (hereafter "Respondents") were named as Defendants in the Court below.

On December 20, 2001, Respondents filed their initial Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The District Count, in its opinion, found the Complaint to be "woefully short" of meeting RICO requirements. The District Court stated that it believed it would be justified in dismissing the Complaint with prejudice. However, the Court allowed Petitioners to amend the Complaint to correct its deficiencies and provided detailed instructions to Petitioners on filing a sufficient RICO Complaint. *See Bonavitacola Electric Contractor, Inc., et al. v. Boro Developers, Inc., et al.*, 2002 WL 31388806 (E.D. Pa) (hereafter "*Bonavitacola I*") at 3-4.

Specifically, the District Court found that the Complaint did not state a claim under RICO because it did not contain any specific allegation of acts of mail or wire fraud, failed to explain how any alleged acts of the Defendants furthered the scheme to defraud or was incident to an essential part of that scheme and failed to contain sufficient allegations as to enterprise, relatedness, and continuity. *Id.* pg. 4.

On November 11, 2002, Petitioners filed an Amended Complaint. The Amended Complaint appears in the Petitioners' Appendix at pages 78-148. Despite the instructions by the Court in *Bonavitacola I,* Petitioners failed to file a "RICO Case Statement" and made very few substantive changes from the original Complaint. The Respondents moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12 (b)(6). By Memorandum and Order dated February 12, 2003, the District Court dismissed the Amended Complaint with prejudice as to all RICO claims. The Court also dismissed the pendent state law claims without prejudice since there was no federal anchor claim to sustain jurisdiction. *See Bonavitacola Electric Contractor, Inc. v. Boro Developers, Inc.*, 2003 WL 329145 (E.D. Pa.) (hereafter "*Bonavitacola II*").

In *Bonavitacola II*, the District Court found that the Amended Complaint failed to plead predicate acts of mail and wire fraud with requisite particularity, failed to plead predicate acts that formed a "pattern of racketeering activity" and failed to sufficiently plead proximately caused injury (App. 32-50). On December 8, 2003, the Court of Appeals for the Third Circuit, whose judgment Petitioners seek to have reviewed, affirmed in an unpublished opinion which is in the Appendix at pages 1-18.

Facts

Bonavitacola Electric Contractors, Inc. ("Bonavitacola Electric") and Boro Developers, Inc. ("Boro") compete with each other for electrical construction, service and maintenance contracts awarded by public and private sector entities in Pennsylvania and New Jersey. (Amended

Complaint, ¶ 13, App. 83-84). On April 28, 1999 and thereafter, Locals 654 and 98 provided electrical workers to Bonavitacola Electric on public works projects awarded to it. (Amended Complaint, ¶¶ 14, 15, App. 84).

Between 1993 and 1999, Boro bid on, and was awarded, public works projects. The Petitioners identified a 1993 project undertaken by the Neshaminy School District (Amended Complaint, ¶ 28), a 1996 project undertaken by the Department of the Navy (Amended Complaint, ¶ 27) and a 1999 project undertaken by the Ridley School District (Amended Complaint, ¶ 26). Each of these projects required Boro to comply with Davis-Bacon Act, 40 U.S.C.A. § 276 *et seq.*, or the Pennsylvania Prevailing Wage Act ("PAPWA"), 43 P.S. § 165-1 *et seq.* (Amended Complaint ¶¶ 22-25, App. 85-87).

In its bids submitted to the respective owner of each of those projects, Boro represented that it would comply with the applicable law regarding prevailing wages. Petitioners claim these representations were false, and were made in order to deceive the said public entities by making it appear that Boro was a qualified and responsible bidder. (Amended Complaint, ¶ 31, App. 87-88).

Bonavitacola Electric submitted a bid for the Ridley School District project on April 28, 1999 and was the second lowest bidder on the project. Bonavitacola Electric therefore was not awarded the contract for that project. (Amended Complaint, ¶ 22, App. 88).

The Amended Complaint alleged that on February 20, 2001 Petitioners became aware that Respondents allegedly engaged in a practice of falsifying certified payroll records

and "other certifications" that were required to be submitted to the Ridley and Neshaminy School Districts, the Department of the Navy, and "others yet named." Mr. Bell claimed that on February 20, 2001 he became aware that Boro had failed to pay him an applicable wage for hours during which he performed electrical construction on the three projects identified in the Complaint dating back to 1993 and "others yet named." (Amended Complaint, ¶¶ 34-37, App. 88-89.) No information was provided concerning what transpired on February 20, 2001 which led to these so-called discoveries.

In the RICO counts, Petitioners alleged that Respondents engaged in a course of conduct designed to obtain the award of electrical contracts from the aforementioned entities by fraudulently subverting the Davis-Bacon and PAPWA by using the United States mail system and/or interstate wire transmissions. (*See, e.g.*, ¶¶ 41, 48 and 55, App. 90, 118, 121.)

Petitioners alleged that the acts of fraud consist of submitting competitive bids to authorities of the Ridley School District which falsely pledged to comply with the prevailing wage laws and falsified certain certified payroll reports in which either an employee identified as "black male" (Amended Complaint, ¶ 42A. (2)) or Mr. Bell (Amended Complaint, ¶¶ 42 B.(2) and 42 C.(2), App. 91) "had performed related work duties despite that the employee had performed electrical construction." (*sic.*)

Clarification of the Record

Petitioners have alleged in the Petition (page 5) at the Statement of the Case that "Boro Developers, Inc. underbid Bonavitacola Electric by approximately $81,000.00 and was awarded the public works contract by the Ridley School District to supply electrical construction to Ridley High School." The supposed "fact" that Boro underbid Bonavitacola Electric by approximately $81,000.00 is not found in the record facts below. Petitioners inserted this new "fact" in an improper attempt to cure one of the deficiencies in the Complaint. The Third Circuit Court, in its opinion, noted that the Amended Complaint does not indicate the extent to which Boro's bid was lower than Bonavitacola's bid or whether Boro's bid had lower labor costs than Bonavitacola's bid (App. pg. 14).

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a Writ of Certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a Writ of Certiorari will be granted only for compelling reasons." *Id.*

Petitioners have not presented any compelling reason for this Court to exercise discretionary jurisdiction over this appeal of the dismissal of this action under Fed. R. Civ. P. 12 (b)(6). Petitioners have not alleged that the decision in the Court below conflicts with any decision of this Court, any Court of Appeals, or any Court anywhere in the world for that matter.

Petitioners assert simply that the Lower Courts erred in finding that the particular facts alleged or omitted by the Petitioners failed to meet RICO pleading requirements. In making such argument, Petitioners do not cite any conflicting cases from Circuit Courts, State, County or this Court. Indeed, in its decision in this case, the Third Circuit of Appeals relied upon the decisions of this Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) and *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Petitioner has not alleged any reasons to revisit these cases.

Petitioner cannot and did not allege that the Lower Courts have so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a Lower Court, as to call for an exercise of the Court's supervisory power.

The District Court allowed the Petitioners to amend the Complaint and provided detailed instructions on properly pleading a RICO action. Following the dismissal of the action after the Amended Complaint was filed, the Third Circuit Court of Appeals exercised plenary review where Respondents' appeal was fully argued and denied. Petitioners offer no reason to disregard and reevaluate the Lower Courts' decisions.

II. THE LOWER COURTS DID NOT ERR IN FINDING THAT THE AMENDED COMPLAINT FAILED TO STATE A CLAIM UNDER RICO SECTIONS 1962(a) AND 1962(c).

The Third Circuit Court of Appeals affirmed the judgment of the District Court concluding that the Amended Complaint failed to allege predicate acts of mail and wire fraud sufficiently, failed to allege the requisite pattern of racketeering activity and did not allege direct injury required for standing under RICO (Racketeer Influenced and Corrupt Organizations Act), 18 U.S.C. §§ 1961-68.

Mail and Wire Fraud as Predicate Acts

The Amended Complaint alleges as predicate acts, that Boro knowingly and repeatedly used the United States mails and/or interstate wire transmissions in violation of 18 U.S.C.A. § 1341 and § 1343 (Amended Complaint at ¶ 41, App. pg. 90). However, the Third Circuit Court of Appeals as well as the Lower Court found that the Amended Complaint does not identify any particular mail or wire transmissions or allege how any mail or wire transmissions are connected to a fraudulent scheme. (App. pg 9.) Fed. R. Civ. P. 9(b) requires that a Plaintiff plead with particularity, the circumstances of the alleged fraud in order to place Defendants on notice of the precise misconduct with which they are charged and to safeguard against spurious charges of immoral or fraudulent behavior. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211, 105 S. Ct. 1179 (1985). This generally requires a Plaintiff to plead the "who, what, when, and where details of the alleged fraud." *Id.* The Amended Complaint also alleged that three bids

contained a fraudulent promise to comply with the prevailing wage law and that Boro falsified over one-hundred certified payroll reports in connection with the three contracts.

The Third Circuit correctly found that even if Petitioners had alleged in the Amended Complaint that the certified payroll reports were the underlying U.S. mail or interstate wire transmissions, "it is not clear at all from the Amended Complaint how they relate to an underlying fraudulent scheme." (App. pg. 10.) It is clear that the Amended Complaint contains no facts which connect the certified payroll reports to the alleged purpose of the fraudulent scheme which was to obtain the award of contracts. The certified payroll reports are submitted after the contract is awarded and the work begins. The Lower Courts correctly ruled that the conclusory allegations did not meet the well-established standards for pleading circumstances constituting fraud with particularity.

Pattern of Racketeering

The lower courts properly followed this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co., Id.*, in finding that the Amended Complaint did not allege fraud that was related or continuous so as to plead sufficiently the "pattern of racketeering activity" element of a RICO claim. In *H.J. Inc., id.*, this Court held that a RICO Plaintiff must allege predicate acts that are related and amount to or pose a threat of continued criminal activity. *Id.*, 492 U.S. at 239. Further, this Court held that predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J., Inc., id.* 492 U.S. at 240.

As noted by the Third Circuit Court of Appeals, the Amended Complaint does not allege that the three alleged fraudulent bids or transactions are related to each other. The Complaint does not allege a common plan with allegations detailing the transactions' similar results, participants, victims, manner of commission, or other detailed characteristics to satisfy the relatedness requirement of this Count's ruling in *H.J., Inc.*

The Court also reviewed this matter using the continuity prong of the test for a "pattern of racketeering activity" as referenced in this Court's decision in *H.J., Inc.* The Amended Complaint fails to adequately plead either open-ended or closed-ended continuity. There were no allegations in the Complaint to suggest that the alleged fraudulent conduct extended beyond the life of the matter before the Court, and there are no allegations in the Complaint from which an inference or suggestion of a future threat of fraudulent conduct can be found. As a result, the Lower Courts were correct in ruling that the Amended Complaint did not allege fraud that is related or continuous as to plead sufficiently the "pattern of racketeering" element of a RICO claim.

Injury Required for Standing

A RICO Plaintiff must show that the alleged RICO violations proximately caused injury to the Plaintiff's business property to have standing. An indirect injury remotely caused by the RICO violation will not satisfy the proximate cause requirement. *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Once again, the Circuit Court as well as the Lower Court analyzed the Amended Complaint for the alleged injury using the

established case law of this Court. As alleged in the Complaint, Bonavitacola Electric's alleged injury is that it did not win certain bids and consequently lost income and profits that it would have earned if it had been awarded the contracts, specifically the Ridley School District contract. The Labor Unions' injury was alleged to be the fact that they would have received additional contributions to their multi-employer benefit plans for employees if Bonavitacola had been awarded the contract.

The Amended Complaint does not allege how Boro's supposedly false promise to comply with prevailing wage law had any influence on the award of the contract and failure to award the contract to Bonavitacola Electric. There are many factors which go into the award of a contract, just as there are many factors which go into the creation of a bid for a contract. The Lower Courts correctly noted that the Amended Complaint does not indicate the extent to which Boro's bid was lower than Bonavitacola or whether Boro's bid had lower labor costs than Bonavitacola Electric's bid. Accordingly, the Third Circuit Court of Appeals and District Court correctly found that the Petitioners failed to sufficiently plead a proximately caused injury, and therefore lack standing to bring this civil RICO action.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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